NO. 48525-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SHELLY MARGARET ARNDT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00428-0

BRIEF OF RESPONDENT

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SERVICE		
	Jodi R. Backlund Po Box 6490 Olympia, Wa 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED January 17, 2017, Port Orchard, WA _____ **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court's exclusion of evidence respected Arndt's right to present a defense and her due process rights where:

a. The trial court properly confined Mann's testimony within the bounds of expert opinion by:

i Excluding opinions regarding the bottom of the melted bucket that Mann found near the couch;

ii. Excluding evidence of Mann's burning bag of peanuts;

iii Allowing Mann from testifying as to the alleged significance of the second bucket;

iv. Excluding reference to police reports where such reports were not typically relied upon by fire experts;

v. Excluding testing that amounted to a selective partial origin and cause investigation;

vi. Properly limiting Mann's opinions on flashover;

h. Not limiting Mann's testimony regarding light in the living room; and

i. Concluding that Iskra and Rice's proper opinion

testimony did not open the door to Mann's improper evidence; and

b. Arndt did not complain below that Mann could have testified as a fact witness; and

c. The trial court properly excluded Hanson's unqualified hearsay testimony?

2. Whether references to Arndt's felony murder conviction should be stricken, but she otherwise fails to show a double jeopardy violation?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Shelly Margaret Arndt was charged by information filed in Kitsap County Superior Court with nine counts:

Count	Charge	Victim	Aggravator(s)
I	Premeditated First-Degree Murder	Darcy "Junior" Veeder	Arson (aggravated murder) Domestic Violence Vulnerable Victim
II	First-Degree Felony Murder	Darcy "Junior" Veeder	Domestic Violence Vulnerable Victim
III	First-Degree Arson		Domestic Violence Impact on Persons Other Than the Victim
IV	Second-Degree Assault	Kelly O'Neil	Domestic Violence
V	Second-Degree Assault	Autumn Kriefels	Domestic Violence
VI	Second-Degree Assault	S.O.	
VII	Second-Degree	L.O.	

	Assault		
VIII	Second-Degree Assault	D.T.	
XI	Second-Degree Assault	Donald Thomas	

CP 352-57.

The jury found Arndt guilty as charged. CP 430-41. As required by RCW 10.95.030(1), the court sentenced Arndt to life without the possibility of parole on Count I. CP 474. No sentence was imposed on Count II. *Id.* The court imposed standard range sentences on the remaining counts, to run concurrently to Count I. CP 473-75.

B. FACTS[1]

1. The fire.

The O'Neils[2] lived in a two-story split entry home in Bremerton. 6RP 954. The main source of heat was a wood insert in the living room. 6RP 956. They burned pressed wood Presto logs in it. 6RP 957. They had never had an ember or log escape from the insert. 6RP 968, 989. There was also a gas fireplace insert downstairs, but it did not work and Sean had shut off the main gas line. 6RP 958. There was no other heating apparatus downstairs. 6RP 958. There were baseboard heaters downstairs,

[1] Due to space constraints, and because Arndt raises no issues regarding the sufficiency of the evidence, the State does not recount the evidence showing her intent and motive.

[2] Sean and Kelly O'Neil will be referred to by their first names to avoid confusion. Similarly, Darcy Veeder, father and son, will be referred to as Senior and Junior. No disrespect is intended.

but Sean had shut off the breakers for them. 6RP 958.

None of the residents smoked. 6RP 970. They did not permit people to smoke in the house. 6RP 970. Visitors would usually smoke outside on the upstairs rear deck. 6RP 970.

Kelly had asked Arndt to come and help with the cleaning. 6RP 1082. After Arndt cleaned, two of the beanbags were on top of the foosball table and the third was next to it. 6RP 1110. They had just gotten the bean bag chairs for the boys that Christmas. 6RP 1084.

Kelly woke up when Arndt threw open her bedroom door. 6RP 1094. She said the house was full of smoke. 6RP 1095. It smelled like tires burning. 6RP 1095. After they got out, she and Arndt counted and realized Kreifels, Junior and Chevy the dog were still in the house. 6RP 1097. Arndt took off into the house. 6RP 1098. Arndt knocked on Kreifels's door and then they ran out through the garage. 6RP 1099.

The night of the fire, Thomas, Junior and Arndt were the last to go to sleep, on the living room couches. 7RP 1206. Thomas was awoken by Arndt. 7RP 1207. She told him she thought there was a fire because she smelled smoke. 7RP 1208. Junior was still asleep on the other couch. 7RP 1208. Thomas went down the stairs to the entry landing and could see fire downstairs. 7RP 1209. He tried to wake Junior by shaking him because Arndt said she would wake up the others. 7RP 1210. He shook Junior

pretty hard. 7RP 1231. He thought Junior was awake. 7RP 1214. Then he went outside. 7RP 1215.

The fire fighters were dispatched at 4:38 am on Sunday morning. 7RP 1281. When they arrived the fire was fully involved, meaning there was fire coming out of every opening. 7RP 1283. It was unusual for a fire that close to the station to be that far along when they arrived. 7RP 1283.

They found Junior was in the middle of the living room under some sheetrock that had fallen from the ceiling. 7RP 1309. He was dead. 7RP 1310. The dog was with him and also dead. 7RP 1310. Junior was about six feet from the couch, in the middle of the room. 7RP 1311. Junior's face was burnt and his hair was completely gone. 7RP 1312. His skin had burned away from his leg and the bone was exposed. 7RP 1312. The cause of death was subsequently determined to be asphyxia secondary to inhalation of toxic combustible materials from the house fire. 8RP 1413.

Four items of burnt debris from the fire were tested at the crime lab. 8RP 1427. There was styrene in the debris. 8RP 1435. It is a byproduct of burning polystyrene. 8RP 1435.

2. Iskra

Fire investigator Edward Iskra worked mostly for insurance companies. 8RP 1471. He explained that fire investigators use NFPA 921

as a guide for investigations. 8RP 1472. Iskra explained many of the terms and principles fire investigators used.

"Layering" or "digging" refers to sifting through the debris from the least to the most damaged areas in an attempt to determine the point of origin. 8RP 1487. "Flashover" is when the air and furnishings in the room are heated from a fire burning to the point that they all auto ignite at the same time. 8RP 1502. When objects get hot, they start to break down and emit vapors. 8RP 1502. The vapors reach a temperature where they combust. 8RP 1503.

The area of origin is the room in the house where the fire started. 8RP 1504. The point of origin is the specific or general point within the area of origin where the fire started. 8RP 1505. It is not always possible to determine the specific point of origin. 8RP 1505. That does not prevent, even under 921, the determination of origin and cause. 8RP 1505.

The "fire pattern" is determined by looking at the char. 8RP 1516. It is deeper and heavier closer to the origin and can show the direction the fire moved. 8RP 1516. The most damaged point is usually the point or origin, but that can be affected by the fuel load in the room. 8RP 1517. Fuel load is the amount of combustible material in the room. 8RP 1517. Further, if there is a flashover, there might be secondary fires that produce heavy burn patterns. 8RP 1518. But such secondary fires are usually

distinguishable. 8RP 1518.

Iskra went to the house to try to determine the origin and cause on behalf of Allstate Insurance. 9RP 1552. Even if he learned the fire marshal's conclusions about origin and cause, Iskra would still do his own independent analysis. 9RP 1558.

Iskra entered the house on March 1 after the fire marshal released the scene. 9RP 1568. In the living room, in the northwest corner of the house, there was extensive damage. 9RP 1575. There were remnants of the couch and tables and TV. 9RP 1576. The dining room, to the northeast, suffered less damage. 9RP 1575. In the living room there were the remains of a Presto log in the fireplace, which was surrounded by a fireproof hearth. 9RP 1576. Most of the fireplace door was melted away by the fire. 9RP 1576. However the melting came from the top and the west, suggesting the fire was moving in that direction. 9RP 1577. The glass of the fire door was completely gone. 9RP 1578. The burn patterns also ruled out the hypothesis that the fire had started on the deck. 9RP 1584. Everything he saw upstairs pointed to an origin on the lower level. 9RP 1585.

He determined that the origin of the fire was at the corner of the couch that was against the south wall of the rec room, which divided that room from the stairwell. 9RP 1612. It was at the east end of the couch.

9RP 1613. There was an outlet behind the couch, but nothing had been plugged into it. 9RP 1614. Nor was there any indication that the wiring in that wall had failed. 9RP 1614. Moreover, the burn pattern of the couch did not indicate that the plug had been the source of the fire. 9RP 1614. They went from the outside toward the wall; if the fire had started at the plug they would have gone in the opposite direction. 9RP 1615. There was a pedestal fan in the southwest corner of the room, but the plug prongs were dirty, indicating it had not been plugged in during the fire. 9RP 1615. Sean also told him it was not plugged in. 9RP 1615. The ceiling fan was damaged from the outside in, which was inconsistent with the fire having originated there. 9RP 1616. Additionally, the wires were still attached and showed no sign of arcing. 9RP 1617. The baseboard heaters were shut off at the panel. 9RP 1617-18. The gas to the downstairs fireplace insert was also shut off. 9RP 1618. The burn patterns also ruled out a point of origin near the foosball table, which was near the sliding door. 9RP 1621.

He did not think there was a flashover downstairs because the open stairwell would have prevented the buildup of heat that causes auto ignition. 9RP 1622. There was full involvement of the room but not flashover. 9RP 1622. This was important because flashover could cause false indicators of where the origin of the fire was. 9RP 1626. Regardless of whether there was flashover or not, his opinion as to origin and cause

would not change. 9RP 1652.

After reviewing the fire marshal's documentation and evidence, he concluded that the fire was incendiary, that it was intentionally set. 9RP 1635. He concluded that the likely ignition source was an open flame from a lighter or matches. 9RP 1635. He did not find any deficiencies in Lynam's investigation. 9RP 1638.

3. Rice

Kenneth Rice was a senior fire investigator with Case Forensics. 10RP 1862. He agreed that NFPA 921 was the best known guide in their field. 10RP 1864. Rice performed a technical review of Lynam's report. 10RP 1894. A technical reviewer reviews all the data, written reports, photos, and evidence collected. 10RP 1894. It is possible on occasion to reach an independent determination of origin and cause in a technical review. 10RP 1894.

In this case, Rice reviewed Lynam's report, Mann's report and other materials. 10RP 1894-95. He spoke with Lynam. 10RP 1895. Lynam appeared to Rice to be a competent investigator. 10RP 1896. He did not exhibit any signs of bias. 10RP 1897.

The Presto log in the upstairs fireplace was unburnt. 10RP 1907. The floor around the vent was only moderately damaged. 10RP 1908. Rice would have expected to see more damage if the fire had begun below the

vent. 10RP 1908. The greatest fire load was against the wall where the couch was. 10RP 1913. Also the joists were most damaged above where the couch was versus the fireplace. 10RP 1915.

There was no damage to the wall cavity and a lot of combustible material left in the area near the sliders. 10RP 1917. Rice therefore concluded that the fire did not start anywhere in that area. 10RP 1917. The area around the downstairs fireplace had minimal fire damage. 10RP 1918. There remained a large amount of combustible material in the area. 10RP 1918. To the right of the fireplace, toward the weight bench there were a lot of unburnt combustible materials, again indicating that that was not where the fire originated. 10RP 1920. The main floor joist running from the stairwell by the couch to the fireplace wall showed significant burning near the couch that lessened as it went toward the fireplace. 10RP 1921.

Because of the amount of combustibles that were left in the room, Rice did not believe that flashover occurred. 10RP 1925. Even if it had, it would not affect the way he would investigate the scene. 10RP 1925.

After reviewing Lynam's report and talking to him, Rice recommended additional testing. 10RP 1928. He proposed a recreation of the upstairs fireplace and floor vents to test whether an ember from the fireplace could have started the fire. 10RP 1928. They installed vents in the floor of the Kitsap County fire training tower and constructed a fire

box on the upper level. 10RP 1929. They lit two Presto logs and some cedar kindling in the box and let them burn. 10RP 1929. After the Presto logs burned for an hour, there was nothing that had come out of the firebox. 15RP 2874. They manipulated the fire with a shovel and no embers came out. 15RP 2875. Then they scooped a clump of Presto log up and set it on the hearth. 15RP 2876. No embers escaped from the hearth. 15RP 2877. Next they scooped a shovelful of glowing coals out of the firebox and placed that on the hearth and no embers escaped. 15RP 2877. Then they slowly scraped the glowing embers off the hearth and into the vents. 15RP 2877.

On the lower level, they filled a plastic laundry basket with crumpled newspapers under the vent. 10RP 1934. They put four sheets of tissue paper under the basket. 10RP 1934. When the embers dropped through, two burned very small holes in the newspaper, but they did not get any flaming combustion. 10RP 1934. The holes were caused by the larger embers. 10RP 1937. Some embers landed on the tissue paper but it did not catch fire. 10RP 1936. The embers cooled on the way down and did not have enough energy left to ignite the paper by the time they landed. 10RP 1936. Based on their testing, it was not probable that an ember from the fireplace started the fire. 13RP 2380. In the test, the newspaper in the basket did not catch on fire. 13RP 2380. In the house, it

was believed that there was nothing on the floor beneath the vent. 13RP 2380.

They also did a smoke test to determine how quickly smoke would have been seen upstairs if the fire had started below the vent. 13RP 2384. It took 18 seconds for the smoke to show up in the upper level. 15RP 2870. Based on witness statements that no one saw any smoke before they smelled the fire it upstairs, the test reinforced the conclusion that fire did not begin beneath the vent. 13RP 2384-85.

They also did an ignition test by placing a bean bag chair next to a leather sofa. 13RP 2386. They used a Bic lighter to ignite the bean bag. 13RP 2386, 2388. The first time they lit it, it went out. 13RP 2389. The second time it ignited. 13RP 2389. After it caught, the Styrofoam filling began to melt and spill out. 13RP 2390. Leather is very slow to burn, but the couch eventually caught fire. 13RP 2393. The Styrofoam melted into a pool that burned and flowed under the couch. 13RP 2395. They let the couch burn until it went out. 13RP 2399. Once the fire had burned itself out, the test couch looked remarkably similar to the remains of the couch at the O'Neil house. 13RP 2402. The conclusion was that it was very probable that something was ignited on the left side of the O'Neil couch that cause it to ignite. 13RP 2402.

Rice concluded that the point of origin was to the left of the sofa.

13RP 2405-06. He also concluded that the cause was incendiary because there was no identifiable accidental ignition source in the area of origin. 13RP 2407.

The pedestal fan was not plugged in so could not have been a source. 13RP 2417. The cord was wrapped around the base and the plug prongs were dirty. 13RP 2417. There was no indication of a fire beginning with the ceiling fan. 13RP 2418. A smoldering cigarette was an unlikely source of the fire. 13RP 2419. First, the O'Neils did not permit smoking in their house. 13RP 2419. Additionally, leather is quite difficult to ignite. 13RP 2419. It is nearly impossible that a cigarette lying on it could ignite it. 13RP 2419. It took about 15 to 20 minutes for the couch to burn all the way through. 13RP 2420. It took about half that time before the couch was fully involved. 13RP 2420.

Rice was not concerned about flashover. 13RP 2421. It was not something he generally took into account in his investigations, because the fire patterns will still be there. 13RP 2421. It appeared to him that Lynam did a thorough investigation following the scientific method. 13RP 2545.

4. Lynam

Kitsap County Fire Marshal David Lynam was called to the O'Neil house around 5:30 a.m. the morning of the fire. 14RP 2616. The incident commander told Lynam that when they arrived there was fire coming from

every opening in the north half of the house. 14RP 2619.

He determined that three of the guests, Arndt, Junior, and Thomas, were smokers. 14RP 2633. They were not permitted to smoke inside and used the rear deck upstairs to smoke. 14RP 2634. He did not inspect the deck for cigarette material because the deck was unsafe. 14RP 2634. They did not find any butts on the ground or in the yard. 14RP 2634.

He was told that the occupants left the front door open when they fled. 14RP 2637. The exterior fire patterns were consistent with the fire venting out the front door. 14RP 2638. Going into the house, the burn patterns were heavier on the north side the stairwell coming up from the lower level. 14RP 2639. They had reports that the fire was first seen at the bottom of the stairs. 14RP 2643. They were able to go down the stairs to get Kreifels but by the time they got her out the fire was too strong to go back the way they came. 14RP 2643. This was consistent with the fire originating on the lower level. 14RP 2643.

At the north end of the downstairs were the family room to the west and the rec room to the east. 14RP 2691. There was a 14 to 16 inch ceiling beam separating the family room from the rec room. 14RP 2703. The stairs were to the south of the family room. 14RP 2691. A bathroom was south of the rec room, followed by Kreifels's bedroom in the southeast corner. 14RP 2691. The garage was in the southwest corner

beyond the stairs. 14RP 2691.

There was heavy fire involvement on both sides of the stairwell. 14RP 2694. In the north end of the rec room, near the weight bench, the walls were not burnt. 14RP 2706. Built in shelves on the south wall of the rec room were full of books and photo albums and other stuff. 14RP 2705. In front of the shelves were a steamer trunk and cardboard boxes with Christmas decorations. 14RP 2705-06. Between the window (to the south) and the sliding glass door was a foosball table. 14RP 2706. There was heavy fire travel as it vented out the window and significant damage to the top of the wall between the window and the shelves. 14RP 2706. However the books and papers on the shelves did not burn. 14RP 2707, 2723. Nor did the trunk or boxes of Christmas decorations burn. 14RP 2707. The foosball table, while damaged was largely intact. 14RP 2708. This indicated that the fire did not originate in this area but traveled over the top of it and out the window and slider. 14RP 2709.

In the northeast corner of the rec room, there was damage to the ceiling but the walls remained intact. 14RP 2712. The lower part of the walls did not even have smoke damage. These facts were inconsistent with the fire starting in that area. 14RP 2713. The burning on the underside of the deck also showed that the fire came out from the slider not vice versa. 14RP 2714. The deck was thus also not the source of the fire. 14RP 2714.

The south wall of the family room abutting the stairs sustained the heaviest damage. 14RP 2714. The sheetrock was burned off and there was substantial charring of the studs. 14RP 2715.

The north wall of the family room near the gas fireplace did not have a lot of fire damage. 14RP 2715. Between the fireplace and the northwest corner along the north wall were some saved newspapers, NASCAR collectibles, and some outdoor sports equipment. 14RP 2117. All of it was substantially intact, with no fire damage on most of it. 14RP 2717. There was even less damage than to the items on the built in shelves in the rec room. 14RP 2717. This suggested that the fire did not originate in this area. 14RP 2717. The rear projection television was not plugged in and the projection bulbs were still intact. 14RP 2740.

The west wall of the family room had no damage at the north end. 14RP 2719. The southwest corner the room was heavily damaged. 14RP 2727-28. The joist above the couch was bowed, indicating that it had been burnt enough to weaken it. 14RP 2728. There was heavy char on the top plate of the wall behind the couch. 14RP 2729. These showed that the fire traveled up from the couch area and across the ceiling of the room. 14RP 2729. There was more char on the west or family room side of the beam separating the family room from the rec room. 14RP 2732. The baseboard heater on the west wall was shut off at the breaker box. 14RP 2742.

The couch was a few feet from the east end of the wall (where the bottom of the stairs was). 14RP 2734. At the other end of the couch was a pedestal fan. 14RP 2753. The considered it as possible ignition source, but it was not plugged in. 14RP 2753. They ultimately determined by the end of the first day of investigating that the area of origin was near the couch. 14RP 2744.

The second day they focused on determining the point of origin. 14RP 2744. They began by layering the materials that were on top of the couch. 14RP 2744. There were springs and parts of the frame, but the left (northeast) part of the frame was missing. 14RP 2749. They ultimately determined that the northeast corner of the couch was the point of origin. 14RP 2749.

They eliminated the outlet behind the couch as the source of the fire because the couch was less damaged there than it was in the front, and because the couch had actually protected the sheetrock from damage in that area. 14RP 2756. The couch was leather. 14RP 2756. Leather is quite fire resistant. 14RP 2758. It is difficult to ignite with a handheld flame. 14RP 2758. It would be unlikely it would ignite from a sparking outlet. 14RP 2760. The results from both the x-ray testing and the forensic engineer confirmed that the outlets were not responsible for the fire. 14RP 2767, 2769. Similar testing was done on the globs and a battery found in

the couch, with similar results. 14RP 2770-71.

They scraped the floors when they were done layering where the fire had been. 14RP 2761. They did not layer the parts of the room that the fire did not extend out from. 14RP 2761. The floor was concrete. 14RP 2762.

Thomas told him that after the children and Kelly had gone to bed, the fire went out in the upstairs fireplace. 14RP 2775. Thomas and Arndt put another Presto log on and tried to get it going. 14RP 2775. He did not indicate the Junior was involved. 14RP 2775. Thomas said they could not get the fire to catch. 14RP 2775. Sometime after that, Arndt woke him up saying she smelt something. 14RP 2776. He went down to the landing, but all he could see was a glow coming from the family room area. 14RP 2777. He could not see any fire in the rec room area. 14RP 2778. There was black smoke coming from around the corner at the bottom of the stairs. 14RP 2778. He ran back upstairs yelling fire, and went to the living room to get his glasses while Arndt went down the hall toward the upstairs bedrooms. 14RP 2779. Thomas shook Junior and said, Fire, fire, you've got to get out." 14RP 2776. Thomas said Junior groaned and he thought he understood. 14RP 2776. Thomas then went down and out. 14RP 2779.

Thomas's description was important because it matched what their observations told them about the fire. 14RP 2780. This was not

confirmation bias because they followed their standard protocols in investigating the fire rather than starting where Thomas suggested the fire was coming from. 14RP 2780.

Kelly's observations were important too. 14RP 2781. She said she was awakened by Arndt pounding on the door and that when they ran down the hall they had to duck because the heat was so great. 14RP 2781. She said that when she left the bedroom, the smoke alarms began going off. 14RP 2782. Then she saw black smoke coming up the stairs. 14RP 2782. She smelled an aroma like burning tires. 14RP 2782. She got the boys and they unlocked the front door and got out. 14RP 2783. She did not see any flames at that point. 14RP 2783. When Kelly went back in after Kreifels she said the smoke was heavier and she saw fire, not in front of her in the rec room area, but to the left of the stairs. 14RP 2784. By the time they got Kreifels out of her bedroom they could not make it back down the hall to the stairs and had to exit through the garage. 14RP 2784-85.

After they established the origin of the fire they began examining possible causes. 15RP 2804. They do that by positing hypothetical causes and eliminating them. 15RP 2804. Under 921 the cause has to be probable rather than merely possible. 15RP 2805. During this process, they created

a diagram of the room to help them examine the possibilities.[3] 15RP 2807. The diagram showed the downstairs family room and the rec room. 15RP 2808.

There were three outlets in the family room. 15RP 2809. They did not take the one toward the northwest side of the room because it was remote from the area of origin. 15RP 2809. The other two were the ones sent out for evaluation. 15RP 2809. The testing disproved the hypothesis that they were the cause of the fire. 15RP 2809.

The pedestal fan, *A* on the diagram, was discarded as a hypothesis because it was not plugged in at the time of the fire. 15RP 2810-11. Similarly, *B*, the baseboard heater, was rejected because it too was powered off at the breaker box. 15RP 2811. The rear projection TV, *C*, was eliminated because it was also unplugged, did not have internal damage, and there was more damage to the southeast side of the it. 15RP 2811-12.

The gas fireplace, *E*, was eliminated because it was not operational. 15RP 2813. The gas was off and the blower fan was unplugged. 15RP 2813.

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[3] During Lynam's testimony, the diagram was presented on a poster board as Exhibit 452. 15RP 2807. A page-sized version of the diagram was also admitted as Exh. 371. *See* CP 511 & 516. The only difference was that Mann added hash marks purporting to show the field of vision from the landing. 20RP 3907. The State has designated Exh. 371 and attached it as an appendix hereto for the convenience of the Court.

The vents to the upstairs living room, which were above the ceramic tile hearth, *D*, were also considered but rejected as a hypothesis. 15RP 2814, 2016. There was a number of reasons for this. 15RP 2814. First, the door to the upstairs fireplace was shut. 15RP 2814. Moreover, the Presto log in the upstairs fireplace had not burned and was still intact after the fire. 15RP 2815. Additionally it would have required a spark, which would have been losing energy every second it traveled, to cross the 18-inch upstairs hearth, travel back under that hearth, through the vents, through the foot-thick space between the floors, travel all the way across the family room to and set a leather couch on fire. 15RP 2815-16. They dismissed this hypothesis as impossible. 15RP 2815. The subsequent testing reinforced that conclusion. 15RP 2815. There was also no competent fuel source below the vents that could have burned there. 15RP 2815. Additionally even if there had been a fuel source, there was still no means for it to have crossed a cold room with no airflow and set the couch on fire. 15RP 2817. In Lynam's experience, he had never seen a spark set a leather couch on fire. 15RP 2817. Likewise, it would be extremely unlikely that a spark could have ignited the carpeting that was in the middle of the room. 15RP 2818. Moreover, fire will not generally travel across a rug on a concrete floor. 15RP 2818.

F was an empty metal coffee can. 15RP 2818. They found it

unusual. 15RP 2818. It was alone in the center of the room next to the remains of the fallen ceiling fan and sheetrock. 15RP 2818. One hypothesis was that it was being used as a butt can. But when they dug it out, the only thing in it was sheetrock. 15RP 2819. There was no butt debris in it at all. 15RP 2819. The O'Neils had no idea where it had come from. 15RP 2819. It was possible it was driven there by the force of the water from the fire hoses. 2819. They thus found no evidence it was the cause of the fire. 15RP 2820. Moreover, even if it was there would be no method for it to have ignited the couch. 15RP 2820.

They also considered whether the ceiling fan could have been the source. 15RP 2822. Lynam had never seen a ceiling fan cause a fire, but he still considered the hypothesis. 15RP 2822. However, the wiring was undamaged and not energized at the time of the fire. 15RP 2823. The rotor still spun and showed no sign of malfunction. 15RP 2822. They also examined the ceiling where it had been mounted. 15RP 2823. The damage was not consistent with that being the origin of the fire. 15RP 2824. And it was six feet from the couch and there was nothing to carry a spark from the fan to the leather couch. 15RP 2825.

G was a cabinet and shelves. 15RP 2820. It was made of wood with some speakers on the bottom and DVDs and VCR tapes on it. 15RP 2821. It had more burning in the front toward the couch than it did in the

back, which caused them to conclude it was a victim rather than a cause of the fire. 15RP 2821.

H and *I* were the weight bench and weight rack. 15RP 2825-27. They were both made of metal, so they did not have any hypotheses about it being a potential cause. 15RP 2825-27. They did observe that the weight bar was bowed up a bit in the middle. 15RP 2826. When heated, steel will move in the direction of the heat. 15RP 2826. The bowing was thus consistent with the fire flowing over the top of it. 15RP 2826.

J was the trunk in the southwest corner of the rec room. 15RP 2827. The trunk still had the veneer on top of it after the fire. 15RP 2828. There was some charring in the area, but that only indicated that the fire had traveled through from somewhere else. 15RP 2828. Both the trunk and *K*, the boxes of Christmas decorations were clearly victims of the fire. 15RP 2828. There was no hypothesis that they could have been the cause; they were light combustible materials and both the boxes and the decorations were still relatively intact. 15RP 2828. Additionally there was no competent ignition source to bring the fire from the rec room to the couch. 15RP 2829. As previously discussed, the wood shelving behind *J* & *K* was loaded with books that were relatively undamaged, and were also eliminated as a cause of the fire. 15RP 2829.

M was the foosball table. 15RP 2831. Kelly had told them that

there were three bean bag chairs on the table. 15RP 2831. However, there was nothing there that could have started a fire. 15RP 2831. According to the manufacturer, the beanbags were made from a nylon covering called "Duramax" and filled with Styrofoam beads. 15RP 2831. They considered the possibility of a smoldering cigarette on the beanbags, but rejected it. 15RP 2831. Nylon is fairly resistant to smoldering fire but not very resistant to flame. 15RP 2832. Nylon will melt around a smoldering fire and smother it. 15RP 2832. Additionally, the foosball table was well outside the area of origin. 15RP 2832.

They did a lot of thinking as to what could have caused the couch to burn. 15RP 2836. They considered smoking. 15RP 2836. However Kelly and Thomas were both adamant that no smoking was allowed in the house. 15RP 2836. He looked through the house, even the outside trashcans, and saw no sign of cigarettes or ashtrays anywhere. 15RP 2836-37. Additionally, the literature was very extensive showing that leather furniture was very resistant to smoldering ignition, particularly with cigarettes. 15RP 2838. Additionally modern cigarettes are safer and more prone to extinguishing themselves. 15RP 2838. Finally, the fire went from an odor to full involvement in a very short time, which would be inconsistent with a smoldering ignition. 15RP 2838. All these factors led them to eliminate smoking as a cause. 15RP 2839.

They considered a candle, but Kelly said they did not have candles, and they did not find any. 15RP 2839.

Next they considered whether it could have been intentional, whether someone held an open flame to the couch. 15RP 2839. Sean said they used a hand torch to light the upstairs fireplace, but they did not locate that. 15RP 2840. Moreover, the literature also indicated that a leather couch was difficult to ignite with a handheld flame. 15RP 2840. They might char, but they take a long time, if ever, to ignite that way. 15RP 2840. They considered that someone needed to bring something to the couch – something that had a fuel source that would burn long enough to get through the leather upholstery and provide enough heat in the area to ignite the foam underneath. 15RP 2840.

There were flammable liquids in the garage, but the lab testing came back negative for flammable liquids. 15RP 2841. The Christmas decorations were still intact. 15RP 2841. There were stacks of newspaper, but newspaper would be difficult to maintain the heat needed. 15RP 2841. There were the books on the shelves, but none appeared to be missing. 15RP 2841.

Then they considered the bean bags. 15RP 2841. They hypothesized that they were combustible and could be lit with a handheld flame and then ignite the couch if placed next to it. 15RP 2841. Although

nylon is resistant to a smoldering fire, it is pretty susceptible to an open flame. 15RP 2842. Additionally, the beads inside are highly flammable if exposed to an open flame. 15RP 2842.

All the beanbags were burned up in the fire. 15RP 2842. To test the theory, they contacted Kelly and learned she had gotten them from Wal-Mart for Christmas. 15RP 2842. They went to Wal-Mart and bought a bean bag and Kelly confirmed it was the same type. 15RP 2843.

They took it to the fire training center and set up a test. 15RP 2844. Lynam was skeptical because he had bean bags as a kid, and the little beads tended to go everywhere. 15RP 2844. He used a standard barbecue lighter. 15RP 2845. He held the lighter to it for about 20 seconds and the nylon melted away and then ignited. 15RP 2845-46. Then the beads started running out and caught fire as well. 15RP 2846. After 20 seconds he removed the lighter, and the bag kept burning. 15RP 2846. Within a minute it was still burning and giving off black smoke that smelled like burning tires. 15RP 2847. Then the nylon went out. 15RP 2847. Lynam expected the beads to smother the fire at this point, but instead they just kept feeding the fire, which continued to build. 15RP 2847-48. After about four minutes, the chair had collapsed and the Styrofoam melted and a pool fire formed. 15RP 2848. A pool fire is where melted liquid is burning. 15RP 2848. They found this significant because if the pool fire ran under

the couch it could have set the foam inside the couch on fire. 15RP 2849. Lynam believed the fire could have ignited the leather as well. 15RP 2849. They were standing five or six feet outside the door of the room where they did the test and the heat was strong. 15RP 2849. They let it burn completely out. 15RP 2850. Lynam anticipated that it would leave a fused bit of nylon and Styrofoam, but all that was left was "fluffy" ash, that could just blow away. 15RP 2850. Some of the nylon had adhered to the concrete in a circular pattern. 15RP 2851. It took about seven minutes to completely burn. 15RP 2850. They concluded that the bean bags were a competent fuel source. 15RP 2851.

They concluded that the fire was caused by someone intentionally setting fire with a handheld flame to combustibles placed on or near the northeast corner of the couch. 15RP 2851.

Lynam was aware the Arndt had a prior history of setting fires. 15RP 2853. That represented a potential bias that he avoided by investigating the fire like every other fire they investigated. 15RP 2852. He was not involved in investigating Arndt's previous arson, and had not seen the reports. 15RP 2853. Nor was he aware of the details of the prior fire. 15RP 2853.

The bean bag chair Rice used was the smaller model, but made from the same materials. 15RP 2890. After the fire was extinguished, the

burnt remains of the couch were in the same pattern as the O'Neil couch. 15RP 2907. The bean bag again left a pattern on the ground, this time in a boot leg pattern parallel with the front of the couch. 15RP 2917. There was a similar pattern in the spalling on the floor of the family room where the end of the couch would have been. 15RP 2917.

The testing confirmed that the bean bag hypothesis was possible. 15RP 2922. The test also left similar artifacts both as to the couch and as to the markings on the floor. 15RP 2922.

The burning tire smell associated with burning beanbag was significant because Kelly said she smelled it early in the fire. 16RP 3015. That was important because the bean bags were last reported to be on the foosball table, which was remote from the area of origin. 16RP 3015. Black smoke observed by the witnesses was relevant because it was consistent with the color of the smoke in the bean bag experiment. 16RP 3017.

III. ARGUMENT

A. THE TRIAL COURT'S PROPER EXCLUSION OF INADMISSIBLE EVIDENCE DID NOT INFRINGE ON ARNDT'S RIGHT TO PRESENT A DEFENSE OR HER DUE PROCESS RIGHTS.

Arndt argues that the trial court erred in excluding portions of his proffered expert testimony and purported impeachment evidence from a disgruntled former employee of the Fire Marshal's Office.[4] This claim is without merit because the trial court properly excluded parts of Mann's opinions that were not based on the governing scientific principles of his field, and/or which lacked a factual basis. Similarly, the court properly rejected Hanson's proposed testimony.

1. The de novo standard of review does not apply to trial court decisions on the admissibility of expert testimony.

A criminal defendant has a constitutional right to question witnesses and offer evidence in his defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). As Arndt notes, this Court generally reviews de novo claims that a defendant has been denied his constitutional right to present a defense. *Jones*, 168 Wn.2d at 719. She nevertheless fails

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[4] Throughout this claim, Arndt repeatedly relies on statements from Mann's untested post-trial declaration filed with her motion for new trial. CP 446-51. Because this information was not before the trial court when it excluded the evidence, it is inappropriate to consider it now. RAP 2.5(b). To the extent that it was a repetition of previous contentions, those speak for themselves; neither the State nor the Court should have to sift through the record to determine which is the case. References to the post-trial declaration should therefore be disregarded.

to recognize that when the defendant claims a violation of her right to present a case by offering expert testimony, Washington courts have "repeatedly followed" an abuse of discretion standard. *State v. Lewis*, 141 Wn. App. 367, 385, 166 P.3d 786 (2007), *review denied*, 163 Wn.2d 1030 (2008).

Further, this right "does not extend to the introduction of otherwise inadmissible evidence." *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010).

2. The trial court only limited Mann's improper testimony.

Arndt argues that in "essence, the trial court limited Mann to testimony based on Lynam's photographs and Mann's own 'plain view' observations at the scene. According to the court, Mann couldn't testify to anything else because he didn't personally perform a full origin and cause investigation." Brief of Appellant at 23 (footnotes omitted). This hyperbole misstates both the basis of the trial court's rulings and the breadth of Mann's admitted testimony.

Mann testified at length at trial. 19RP 3573 - 21RP 4162. The topics the jury heard his opinions on included Lynam's alleged bias. 20RP 3812-17, 3843, 3860, 3885-86, 3928, 21RP 4043-44, 4147-48. He testified about the evidence of flashover, whether it occurred and why he thought that was important. 20RP 3818-29, 3846, 3894, 3943-44, 4036, 21RP

4043. He criticized Lynam for his purportedly minimal documentation, for inadequate layering of the scene, and for insufficient evidence collection and improper storage. 20RP 3835-73, 3884-8921, 3915-19, 3924, 3929-30, 3932, 3937-38, 3945, 3948, 3952-53 RP 4042, 4148-49. He argued that Lynam used myths and anecdotal experience instead of proper scientific data. 20RP 3875-80, 3920. Mann asserted that Thomas could not have viewed fire from his vantage on the mid-level landing, rendering Lynam's reliance on his account suspect. 20RP 3905-12. He extensively discussed smoking as a potential cause and why he felt Lynam gave short shrift to that hypothesis. 20RP 3914-20. He criticized Lynam's conclusion that the door on the living room fireplace was closed. 20RP 3923-24. He challenged Lynam's analysis of the electrical outlets and breakers. 20RP 3925-28. He disputed Lynam's conclusions regarding the condition of the family room ceiling beam and joists and measurement of the depth of char. 20RP 3928-42, 3944-45. He faulted Lynam's consideration of the foosball table and failure to test for the remains of the beanbags there. 20RP 3945, 21RP 4041-42. Finally he spent a considerable amount of time opining on the vent and ember causation theory. 20RP 3946-55, 3958-59.

The trial court did not seek to prevent Arndt from presenting her defense. It merely held her to the established evidentiary standards. A trial

court's exercise of discretion to exclude expert testimony under ER 702 does not violate a defendant's constitutional rights to present a defense. *Lewis*, 141 Wn. App. at 385. Indeed, "even where the relevance and helpfulness of expert witness testimony is debatable, there is no error if the decision to exclude is based on tenable grounds." *In re McGary*, 175 Wn. App. 328, 338-41, 306 P.3d 1005, *review denied*, 178 Wn. 2d 1020 (2013). As a result, to prevail on his right to present a defense claim, Arndt must show that Mann's testimony met the requirements of ER 702. *Lewis*, 141 Wn. App. at 386 (*citing State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003)).

a. The trial court properly confined Mann's testimony within the bounds of expert opinion.

Perhaps recognizing the weakness of her contentions, Arndt chose not to address the case law on which the trial court relied until nearly the end of her brief.[5] The State feels it makes more sense to address the law on which the court relied first.

As Arndt points out, the State's argument and trial court's rulings largely relied on principles set forth in *McGary*, *Lakey v. Puget Sound Energy*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013), and *Davidson v. Metro Seattle*, 43 Wn. App. 569, 719 P.2d 569 (1986). She attempts to

[5] *See* Brief of Appellant at 41.

distinguish these cases based on superficial factual differences. She fails, however to show that the legal principles were inapplicable.

To admit expert testimony under ER 702, the trial court must determine that the witness qualifies as an expert and that the testimony will assist the trier of fact. *Lakey*, 176 Wn.2d at 918. *Lakey* compared the tests for admissibility under ER 702 and *Frye*:[6]

> *Frye* excludes testimony based on novel scientific methodology until a scientific consensus decides the methodology is reliable; ER 702 excludes testimony where the expert fails to adhere to that reliable methodology."

Lakey, 176 Wn.2d at 918-19. Unreliable testimony does not assist the trier of fact and is properly excluded under ER 702. *Lakey*, 176 Wn.2d at 918.

The trial court may also consider questions related to reliability under the "helpfulness to the jury" standard of admissibility. *State v. Copeland*, 130 Wn.2d 244, 259, 922 P.2d 1304 (1996). The trial court's conclusions regarding helpfulness will depend on its evaluation of the state of knowledge presently existing about the subject of the proposed testimony and its appraisal of the facts of the case. *State v. Riker*, 123 Wn.2d 351, 364, 869 P.2d 43 (1994). The trial court has broad discretion in determining whether an expert's testimony is admissible under ER 702. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004).

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[6] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Additionally, under ER 703, facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." This rule allows a broad base for an expert's factual basis for his opinion; it "does *not* indicate that an expert need not *have* a factual basis on which to base his opinion." *Riccobono v. Pierce County*, 92 Wn. App. 254, 266-69, 966 P.2d 327 (1998) (emphasis the Court's). If other experts in the relevant field would not rely upon such information or would only rely upon such information for purposes of litigation, then the information is not a sufficient basis for an expert to express an opinion. *McGary*, 175 Wn. App. at 340. The reason for this requirement is because ER 703 is concerned with the trustworthiness of an expert's opinion. *Id.*

A closer look at the cited cases shows the trial court properly relied on them. In *Lakey*, a group of homeowners sued Puget Sound Energy (PSE) claiming an electrical substation in their neighborhood was a nuisance because of the electromagnetic fields (EMF) emanating from it. *Lakey*, 176 Wn.2d at 914. On PSE's motion to dismiss, the trial court ordered the homeowners to produce scientific evidence in support of their claims. *Lakey*, 176 Wn.2d at 915. They produced declarations from a Dr. Carpenter, which PSE challenged based on *Frye*. *Id.*

At the *Frye* hearing, Carpenter testified that he had conducted an epidemiological study based on a literature review, and asserted this was generally accepted practice. *Lakey*, 176 Wn.2d at 916. However, Carpenter admitted that he discounted studies and data that did not support his conclusions. *Id.* PSE's experts testified that epidemiology has protocols to ensure accurate and reliable results, and that Carpenter's failure to comply with them by not considering all the data relevant to a link between EMF exposure and illness violated generally accepted epidemiological practices. *Id.* The trial court therefore excluded Carpenter's testimony because his theories lacked general acceptance in the scientific community and that he had failed to follow proper epidemiological methodology, rendering his conclusions unreliable. *Lakey*, 176 Wn.2d at 917.

On appeal from summary judgment, the homeowners challenged the trial court's exclusion of Carpenter's testimony under *Frye*. *Id.* As noted above, *Frye* only applies to novel scientific theories. *Lakey*, 176 Wn.2d at 918-20. Because epidemiology was not novel, the trial court erred in excluding Carpenter's testimony under *Frye*. *Id.*

The Court nevertheless affirmed the exclusion of Carpenter's testimony under ER 702:

> The trial court possessed the discretion to find that Carpenter's failure to follow proper methodology rendered

> his epidemiological conclusions unreliable and unhelpful to the jury as a matter of law. Carpenter's admission that he selectively used data created the appearance that he attempted to reach a desired result, rather than allow the evidence to dictate his conclusions. The trial court did not act in a manifestly unreasonable manner in excluding his testimony, and we will not disturb its decision.

Lakey, 176 Wn.2d at 921.

Arndt argues that because Mann was not conducting an origin and cause investigation, but only critiquing Lynam's investigation, Lakey does not apply. Arndt offers no authority for the proposition that general propositions regarding the evidence rules are necessarily fact-specific. *Cf. State v. Austin*, 191 Wn. App. 1013 (2015), *review granted on other grounds, cause remanded*, 185 Wn.2d 1025 (2016) (applying *Lakey* to expert testimony evaluating detective's interrogation technique).[7]

Moreover, as will be discussed in more detail with regard to the specific claims,[8] that Mann was *not* conducting an origin and cause investigation was the State's entire point. The fire investigation community relies on the scientific method, which requires that they consider all hypotheses and reject them before coming to conclusions. What Mann attempted to do, however, was to selectively address certain hypotheses, thus doing in essence, a partial origin and cause. Such a

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[7] Unpublished opinion; *see* GR 14.1(a).

[8] *See* sub-issues (e), (f) & (g), *infra*, regarding the police reports, polystyrene at the foosball table, and flashover.

procedure is not generally accepted in the fire investigation community, not authorized in the 921 manual, and was thus properly excluded. Mann was undoubtedly qualified to critique whether Lynam followed the appropriate procedures. He was not qualified, however, to depart from the accepted protocols of his profession and present the results to the jury. That is the essential holding of *Lakey* and the trial court properly applied it to Mann.[9]

McGary involved a sexually violent predator (SVP) proceeding. McGary sought to present the testimony of a Dr. Wollert, who had developed a test (MATS-1) to determine the statistical probability of re-offense. *McGary*, 175 Wn. App. at 333. The State did not challenge Wollert's credentials, but objected to him rendering an opinion based on his MATS-1 test because other experts in the field did not rely upon it. *Id.* Wollert provided an offer of proof that there were six other experts who used the MATS-1 test and that he did not know whether those experts had testified in trials exclusively for defendants. *McGary*, 175 Wn. App. at 335. The trial court excluded the testimony under ER 702 and ER 703, specifically because the MATS-1 test was not reasonably relied upon by experts generally, because there was no proof that experts would use it for

[9] *See also Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 181, 313 P.3d 408 (2013) (experts may not avoid the rules governing expert testimony "simply by eschewing the use of any particular methodology or technique and purporting to rely only on their knowledge and experience.").

any reason other than litigation and because the testing procedure was not a sufficient basis to support his ultimate opinion on recidivism. *McGary*, 175 Wn. App. at 335.

On appeal, the Court upheld the trial court's ruling, because as in *Lakey*, exclusion of expert testimony for failing to follow a reliable methodology was proper. *McGary*, 175 Wn. App. at 340. The Court further noted that because ER 703 was concerned with the trustworthiness of the resulting opinion, a trial court should not allow an opinion if the expert can show only that he customarily relies on such material and that the data are relied on only in preparing for litigation. McGary, 175 Wn. App. at 340 (*citing State v. Nation*, 110 Wn. App. 651, 663, 41 P.3d 1204 (2002), *review denied*, 148 Wn.2d 1001 (2003). In *Nation*, the Court had held that where an expert "in essence stated the tests [we]re prepared for court testimony ... the second part of the ER 703 test was not met and it [would be] an abuse of discretion for the court to admit" the testimony. *Nation*, 110 Wn. App. at 663-64.

The trial court properly applied both principles to Mann's testimony. Mann did not rely upon facts that other fire investigators would under 921. Moreover, Mann clearly failed to follow the scientific method

only for purposes of this litigation.[10] As with *Lakey*, Arndt fails to show these principles depend on the nature of the expert testimony.

Finally, in *Davidson*, the plaintiff sued Metro Seattle for injuries stemming from a fall on a bus. *Davidson*, 43 Wn. App. at 569. She alleged, based on expert testimony from an accident reconstructionist, that the driver reacted inappropriately when he swerved to avoid a car that cut the bus off. *Davidson*, 43 Wn. App. at 571. On appeal, the Court of Appeals reversed and remanded for a new trial. *Davidson*, 43 Wn. App. at 578.

The Court found the expert's opinion lacked a factual basis and was improper because he assumed facts that conflicted with eyewitness testimony and used those "inferences in turn, piling one upon another, to bootstrap himself to the ultimate conclusion that the bus driver's actions were inappropriate and unnecessary." *Davidson*, 43 Wn. App. at 575. The court rejected his approach because "[p]resumptions may not be pyramided upon presumptions, nor inference upon inference." *Id.*

Arndt would dismiss *Davidson* because neither expert was discussing another's methodology. Brief of Appellant at 42. But the above-quoted passages were the only reasons the State cited *Davidson*:

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[10] *See* sub-issues (c), (f), (g) & (h), *infra*, regarding the burning bag of peanuts, polystyrene at the foosball table, flashover and the light in the living room.

> Additionally, an expert cannot testify to an opinion when there are no supporting facts on which to base an opinion. An expert must be able to base on opinion on logical conclusions inferred or deducted from established facts. An expert cannot base an opinion from facts not in evidence or on facts that conflict with eyewitness testimony.

CP 381-82 (footnotes citing *Davidson* omitted). Whether an expert is testifying about bus driving or fire investigation, these principles are valid, and the trial court properly relied on *Davidson* for them.[11]

b. The trial court properly excluded opinions regarding the bottom of the melted bucket that Mann found near the couch.

Arndt first faults the trial court for not allowing Mann to opine regarding the significance of a melted plastic bucket he found near to Lynam's determined area or origin. Mann would have testified that the presence of the bucket and a purported protected area beneath it cast doubt on the beanbag-to-couch theory of ignition. 19RP 3673.

The problem with this theory, however, is that there was no evidence establishing that the bucket was in fact there at the time of the fire. Kelly testified that after Lynam released the scene, but before Mann arrived, the O'Neils went through the storage area under the stairs. 17RP 3357. Some stuff was melted and they randomly dumped it throughout the downstairs, including in the area where the couch had been. 17RP 3357.

[11] *See* sub-issues (b) and (h), *infra*, regarding the first bucket and the living room lighting.

They had a number of plastic buckets in the storage and they had melted.[12] 17RP 3358.

Likewise, Ed Iskra testified on rebuttal[13] that he did not see any remains of buckets on the floor in the area near the end of the couch. 22RP 4243. He examined the area closely all the way to the wall. 22RP 4243. The floor was clean. 22RP 4243. Arndt supposes that this shows that Lynam and Iskra conducted a shoddy investigation, rather than the more obvious conclusion: the bucket was, as suggested by Kelly's testimony, in the closet.

To contradict these firsthand accounts, Arndt offered only the assertion that the bucket was visible in Lynam's photographs. 19RP 3677. However, the only one he cited was Exhibit 474, which Arndt has included in the record. 20RP 4006. Examining that photo it is not at all apparent that there is a melted bucket near the end of the couch. As the proponent of the evidence, Arndt bore the burden of production; she failed to meet that burden.

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[12] Arndt claims that the clean underside of the bucket showed it was there at the time of the fire. Brief of Appellant at 24. She fails to explain why that would not be true if the bucket had melted in the closet.

[13] Thus although Arndt is correct that Lynam was not asked about the issue on rebuttal, her implication that the issue was not addressed there is disingenuous. *See* Brief of Appellant at 24 n.45.

Because there was no credible evidence presented that the bucket was present in that location during the time of the fire, the trial court properly excluded Mann's opinions about it. Nevertheless, Mann did testify about it. He testified that it was "entirely consistent with an object that I had seen many, many times in previous investigation, and that is the exposed remnants of a plastic bucket." 20RP 4023. He further stated that "Because immediately adjacent to an area which was spalled, which was attributed to melting and burning plastic, that being polystyrene, I have polyethylene remnants that have protected the floor." *Id.* Although the State objected to that testimony, the trial court did not sustain the objection. 20RP 4032. Indeed, Mann went on to testify that because the bucket was made of polyethylene, which melts at a lower temperature than polystyrene, he would not expect the bucket to have survived if the bean bag had burned in that area. 20RP 4032-35. He reiterated this testimony the next day. 21RP 4046-47.

Thus even though the trial court limited Mann's testimony regarding the implications of the plastic bucket, Mann still testified to the only alleged significance of the bucket. The only fact that was excluded was that Mann lifted the bucket. Given the extent of his testimony about the bucket that the jury did hear, and given the highly dubious nature of

the underlying facts, any error would be harmless beyond a reasonable doubt.

c. The trial court properly excluded evidence of Mann's burning bag of peanuts.

In a footnote, Arndt also claims the trial court erred in excluding a series of photographs in which Mann set fire to a plastic garbage bag full of packing peanuts, which he offered as demonstrative evidence. Brief of Appellant at 26 n.50. She fails to show that the trial court abused its discretion.

Demonstrative evidence is permitted "if the experiment was conducted under substantially similar conditions as the event at issue." *State v. Finch*, 137 Wn.2d 792, 816, 975 P.2d 967 (1999). Determining whether the similarity is sufficient is within the discretion of the trial court. *Id.* This Court reviews the trial court's evidentiary ruling for abuse of discretion and will only disturb the ruling if it is manifestly unreasonable or based on untenable grounds. *In re Duncan*, 167 Wn.2d 398, 402, 219 P.3d 666 (2009). A ruling is manifestly unreasonable if it "adopts a view that no reasonable person would take." *Id.*

Where the proponent fails to show that demonstrative evidence was substantially similar to the actual events the trial court properly excludes it. *State v. Stockmyer*, 83 Wn. App. 77, 920 P.2d 1201 (1996).

Here, the trial court excluded the evidence for precisely that reason: "it doesn't replicate the situation and the circumstance that we have in this investigation." Arndt provides no argument for why this conclusion was wrong other than that it "deprived [her] of her constitutional right to present a defense." This does not meet Arndt's burden as appellant of showing trial court error and this claim should be rejected.

d. The trial court did not prevent Mann from testifying as to the alleged significance of the second bucket.

Arndt next complains Mann was limited from discussing the significance of a second melted bucket that he found near the downstairs hearth.[14] Contrary to her contentions, Mann did tell the jury what he felt was the significance of the second bucket and other materials in the area of the hearth.

He testified that he found another piece of plastic on the downstairs hearth. 20RP 3959. Arndt admitted a photo of it through Mann. *Id.* He then explained its significance to the jury:

> Q. So what is the significance of that plastic that you identified in this photo?
>
> A. This was not identified by the previous two investigations, but was definitely present when I

[14] Contrary to Arndt's claim that the State "later persuaded the court that kicking the bucket to see if it was stuck," was improper, Brief of Appellant at 29 n.53, the court did not sustain that objection or instruct the jury to disregard the testimony. 20RP 4006.

was there. And, in fact, if you nudged it, it didn't move, it was stuck to the floor.

Q. Okay. I want to take you to -- when you have a fire and there are protected areas, is there things that you would expect to see in any fire with regards to those protected areas?

A. Yes. I have seen tens of thousands of protected areas in my career. As soon as you have a piece of plastic that's been melted or stuck to a surface, the surface under that material, if the bottom side of that plastic is in pristine condition, that says that the surface it was attached to never went above the melting point of the material that is adhered to it.

20RP 3959-60. He further testified that Lynam did not layer the downstairs hearth. 20RP 3952-53. He told the jury that the area was relevant to the hypothesis that an ember from the upstairs fireplace started the fire. 20RP 3953. He testified that the vents were such that "showing that something dropping straight down may or may not have a good likelihood of making it through the vent. 20RP 3959.

It is difficult to see what more of use Mann could have stated on this subject that would have allowed him to support his expert opinion "that Lynam and Iskra failed to adequately investigate the basement room or rule out the area below the living room fireplace as the point of origin." Brief of Appellant at 30.

Moreover, as discussed in the factual section of this brief, Rice and Lynam's testing effectively and persuasively disproved the whole "magic ember" theory of origin and cause. Arndt makes the illogical argument

that Rice and Lynam's "test rested on the assumption that the tile below the vents was either bare or had nothing more combustible than newspaper and tissue" and therefore did not consider there might be other items on the downstairs hearth. Brief of Appellant at 30. The point of their test was that even highly flammable loose newspaper and tissue paper did not catch fire when a fire fighter shoveled a bunch of very hot embers through the vents. How a stray ember might somehow have therefore ignited some hardier object is not apparent. Because the State effectively showed that the ember theory was unlikely if not impossible *and* remote from the point of origin, any error in this minimal exclusion of evidence would be harmless beyond a reasonable doubt.

e. The trial court properly excluded reference to police reports where Arndt failed to show such reports were typically relied upon by fire experts.

Arndt asserts that the trial court erred by excluding Mann's testimony that he reviewed "police reports and other available materials." Brief of Appellant at 31. She then asserts that Lynam and Rice relied on reports "prepared by police, firefighters and the coroner." *Id.* Her citations however do not support this contention. *See* RP (9/11/15) 21 (discovery discussion); 10RP 1895 (Rice states he reviewed reports of Lynam and Mann); 13RP 2422-23 (Rice reviewed Mann's report); 13RP 2449-52

(Rice reviewed Lynam's report and crime lab report);[15] 13RP 2481 (Rice reviewed Iskra's report), 15RP 2988 (discussion with Lynam about Gundrum's report, but he did not review her report before issuing his own, 15RP 2982).

The trial court's initial ruling on the topic followed a colloquy in which Arndt agreed to the limitation:

> THE COURT: Will you be referring to any of these other police reports or coroner's reports?
>
> MR. LaCROSS: Not the coroner's reports, nor the police reports.

19RP 3723.

> THE COURT: Well, any of the information that can be testified to by this witness is going to be contained in the Fire Marshal's report. There will be no reference to –
>
> MR. LaCROSS: I would agree to that.
>
> THE COURT: – the Deputy Coroner, Mitchell. There will be no reference to her. Unless there is an offer of proof, there will be no testimony as to dissemination of material or information about prior history of arsons or domestic violence or anything of that sort.
>
> So, again, limited – Sorry?
>
> MR. LaCROSS: I agree to that. That's what I agreed to.
>
> THE COURT: So we're limited to the report, right.
>
> MR. LaCROSS: Right.

[15] Although Rice did review the fire fighters' and coroner's reports, he did not feel they were significant to his review. 13RP 2451-52.

> THE COURT: And so reference to – reference to other police reports, coroner's reports, or any of the statements that were outlined by Ms. Montgomery just now, those are not proper areas of inquiry, and they are not proper areas of testimony. Unless there is an offer of proof that somehow that's part of the report, which clearly it's not.
>
> MR. LaCROSS: Which is what I agreed to for –

19RP 3728-29. Despite that agreement, Arndt subsequently sought to elicit testimony through Mann that Thomas made a differing statement to Gundrum than he did to Lynam.[16] 19RP 3742. The State responded that the information was not relevant to the validity of Lynam's investigation because Gundrum's report was not available to him before he made his origin and cause determination. 19RP 3743. As noted above, Arndt herself elicited that fact from Lynam. 15RP 2982.

The State acknowledged that an expert could rely on and testify about otherwise inadmissible evidence if it was the basis for his opinion. 19RP 3744. The State's objection, however, was that Arndt had failed to show that the information was of the type relied upon by experts in the field, as required by ER 703:

> So on what basis is he requiring Fire Marshal Lynam to read all of the police reports prior to Fire Marshal Lynam writing his origin and cause opinion. That's the link that they keep missing.

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[16] The purported difference was whether Arndt smoked or not. 19RP 3742. The significance of this discrepancy is not explained.

> What they want to do is they want to review everything after the fact and say, well, Fire Marshal Lynam should have read all of this information before rendering an origin and cause opinion and, therefore, since he didn't, it's not valid.
>
> But Dale Mann doesn't have any resources that show that that's a requirement anywhere. It's just his personal opinion. It's not even an expert opinion because it would have to be based on what all of fire science folks do. And he doesn't have that.

19RP 3744-45. The court accepted that argument:

> THE COURT: I'll sustain on that basis, so far as a reference by this witness as to police reports.
>
> So no that question can't be asked as to what he reviewed in the police reports.

19RP 3745. After a brief recess, the court further explained the basis for its ruling.

> I do want to mention as well, I was looking again at 703, and it does indicate here that an expert may express an opinion based upon facts reasonably relied upon by the experts in a particular field in forming opinions or inferences.
>
> It is based upon that, that I have granted the State's request on the last issue concerning the police reports. I've not seen any demonstration that the police report, as they have been presented, would be reasonably relied upon by experts in this field evaluating fire investigations.

19RP 3746-47. Arndt then made an offer of proof with Mann in which he said *he* would have looked at the police reports if it had been his investigation. 19RP 3750. The court nevertheless continued to express concern that the testimony did not satisfy ER 703:

> THE COURT: Where in the scientific literature does it say that a fire marshal needs to go through the police reports and verify every statement and essentially track a police investigation?
>
> I suppose that's really what it comes down to when we get to this sort of thing.
>
> Is the Fire Marshal expected to follow a coroner's report or to follow a police report to consistently cross-check facts?
>
> Is that in the fire literature under 921 saying that that is the scientific method?

19RP 3758-59. Arndt conceded that it was not:

> MR. LaCROSS: There is nothing – there is nothing in the NFPA 921[17] that says you have to go and verify with – check with the investigating sheriff's department or anything like that.

19RP 3759. Based on that concession, the court stood by its earlier ruling.[18] 19RP 3760.

Although she again asserts that this testimony was vital to her defense, Arndt fails to explain why as a matter of law or fact the trial court's ruling was incorrect. She baldly asserts that the testimony was admissible under ER 703, Brief of Appellant at 32, but fails to identify any evidence in the record for the conclusion that examination of police reports was something relied upon by experts in the field.

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[17] Arndt emphasized throughout the trial that this document was the leading guide in fire investigation.

[18] The court noted that the information had already been introduced through other witnesses. 19RP 3760.

Finally, even if the trial court should have admitted the testimony, the only offer of proof was that Thomas was mistaken about whether Arndt was a smoker. Nothing in Lynam's conclusions or in the State's theory of the case depended on whether Arndt was a smoker. Indeed, Lynam ruled out smoking as a cause of the fire. As such any error would be harmless beyond a reasonable doubt.

f. The trial court properly excluded Mann's testing that amounted to a selective partial origin and cause investigation.

Arndt next complains that Mann was not permitted to testify that he had conducted lab testing to determine if there was polystyrene in the area of the foosball table. The trial court initially was going to permit Mann to testify about testing for polystyrene in the area of the foosball table. 19RP 3564-65. However, after a voir dire was conducted, the court revisited the issue.

During the voir dire, it was brought out that Mann did not undertake to do an origin and cause investigation. Instead he was only reviewing the adequacy of Lynam's procedure:

Q. When you were doing your review of what Fire Marshal Lynam did in this case, did you have hypotheses?

A. No.

Q. None at all?

A. In my – my review of his case was strictly that, a review of his investigation.

Q. But in order to review his investigation, wouldn't you have to have some hypothesis to determine whether or not his hypotheses were correct?

A. A review involves evaluating the processes used by that investigation –- investigator to reach his opinions. So what I did in my review was to evaluate his approach, his thought process, and his conclusions.

That was the basis of my review and that was the extent of my review.

19RP 3610. Mann did not do an origin and cause investigation. 19RP 3619. He again explained the scope of his assignment:

> A review process, which is what this was, is an evaluation of whether or not the investigator has sufficient data to come to test his hypothesis and to reach his opinions. This was not an origin and cause investigation for me. … This was an evaluation of the investigative file as packaged up neatly by the fire marshal.

19RP 3626. He admitted that he in order to do that review, he did not need to conduct addition investigation.

Q. If you're trying to determine whether or not this fire marshal did an appropriate investigation, you could have done that based on his data alone?

A. Yes, I have done that many times. Looked only at the paper file, if that's all that's available.

Q. And you did that, but went further for purposes of this litigation, did you not?

A. Absolutely.

19RP 3627. The State inquired of Mann as to why he needed more to find fault with Lynam's investigation:

Q. Let me break this down, just so the bear [sic] minimum here, Mr. Mann.

You said he ignored data or statements, whatever you want to call it, he ignored that in your opinion about whether or not there were bean bag chairs at the foosball table; yes or no?

A. He made no attempt to validate that statement.

Q. Okay. Isn't that a conclusion?

A. Is what a conclusion?

Q. The fact that he made – isn't your statement, "He made no attempt to validate that conclusion," isn't that your opinion?

A. Yes.

Q. And so for purposes of rendering an opinion today, that Fire Marshal Lynam's evaluation and investigation was insufficient, you can base that opinion on the fact that he failed to consider it, right?

19RP 3630-31. Mann asserted that he had to do additional testing because Lynam did not verify the witness statements that the bean bags were on the foosball table. The State then asked him why the same theory did not apply to the ceiling fan, which Mann also criticized Lynam for eliminating. Mann responded:

> It is not incumbent on me to collect those items and examine them. That is his job. He is basis [sic] his opinion on the elimination of those as legitimate causes.

19RP 3635. He further added with regard to the ceiling fan:

> He never considered it. I don't need to. He overlooked it. It's not my duty then to collect it. That is his responsibility.

19RP 3636. He stated the same thing with regard to the pedestal fan, which Mann also criticized Lynam's consideration of. *Id.* He ultimately asserted that his only function was evaluation of Lynam's work:

> A. … My job is to evaluate how he got there. And can that conclusion hold up under the tenets of science.
>
> Q. And so for you to rule out the things that he didn't rely upon or did rely upon was unimportant to you because all you're dealing with was his data?
>
> A. I was looking at his data. Correct.

19RP 3642. The State then argued that although Mann claimed not to have done an origin and cause investigation, and claimed to only be evaluating Lynam's methodology, what he actually was attempting to do was to "selectively chose data that he wanted to identify to analyze and test, and that was the foosball table." 19RP 3645. Further, while Mann certainly could have done an origin and cause investigation, he did not.[19] 19RP 3647, 3658.

Because Mann did not do his own origin and cause investigation, the court excluded any testing done by Mann as beyond the scope of his examination of Lynam's performance:

> THE COURT: Okay. Thank you. I'm ready to rule on this issue. And, you know, we've had a lot of the same discussion, but this most recent testimony has really highlighted some very, very important and difficult issues that I must address. This court is the gatekeeper. It would

[19] Both Mann and the defense repeatedly asserted he did not do an origin and cause investigation. *E.g.*, 5RP 836; 19RP 3649.

be inappropriate to just allow anything to come in, and it seems to me, on what was not entirely apparent before based upon the offer of proof, given the testimony from Mr. Mann, I am greatly concerned as to how he intends to testify.

He is saying on the one hand that he's not doing an origin and cause. But on the other hand he is taking nibbles at doing an origin and cause. He's going beyond an evaluation of the protocol procedures followed by the Fire Marshal.

It is not a problem that he goes to the scene, as defense argues, but it is a problem when he starts to test. That is a big problem in this case, because at that point in time he becomes an investigator. And an investigator, if he is to be considered reliable by this court – if he's going to do an origin and cause, that's fine, let's call it that. But he hasn't done that. He said many times over he didn't do an origin and cause.

So he can't get to pick and choose what aspects of the fire scene, what possibly origin and cause.

And if I were to allow him to testify to the polystyrene testing, that effectively allows this witness to go through a fire scene and pick out areas that he believes are important for purposes of this litigation to advance or diminish certain aspects of the scene.

If he were to do an origin and cause, he would need to follow the scientific method and eliminate various hypotheses.

Instead by focusing on one area, which seems to be this foosball area, he's taking one hypothesis and testing it. And not eliminating, under the scientific method, the entire scene. And that was especially evident when asked about the fan. Because he said himself, well, I knew that the investigation was inadequate because the Fire Marshal didn't test the fan. Well, that was apparent. And he said he didn't need to do anything more than that. He didn't pick up the fan to see if it worked.

If his belief that that was enough for him to make the analysis that the fire marshal didn't do the work he

needed to do, that same analysis could have been done with the foosball area.

It would have been, well, the Fire Marshal didn't evaluate the foosball area, period. Instead he went a step further. And it is this court's review, in furtherance of litigation to test that area for polystyrene, and that's where he exceeds his limits.

So with this new testimony, I am revising my previous ruling.

This witness will not testify as to his learning or investigation of the foosball area in order to test for the polystyrene. He's not going to be able to go into that area.

He is only able to testify to the work done by the Fire Marshal. He is not to give an opinion as to the ultimate origin and cause.

Which gets me back to another issue, which was, when he state, [sic] while he agreed with the origin of the fire – unless he's doing an origin and cause, he's essentially developing hypotheses. And I don't believe based upon the testimony that he can make that call. He can testify as to – in his opinion whether the – if he wants to say that based upon what he believes is an inadequate investigation that he agrees with the Fire Marshal, that – that he agrees with the Fire Marshal's procedures in coming to that conclusion, that's fine. But he's talking about procedures and protocol.

But he doesn't get to give an opinion as to origin and cause, or any testing associated with it.

19RP 3650-53. The trial court's analysis was sound, within the controlling law, and within its discretion.

Finally, even if there were error it would be harmless beyond a reasonable doubt. The presence of beanbag remains[20] near the foosball table would be unsurprising and in no way damages Lynam's conclusions.

Although Lynam's initial test, where he burned a beanbag by itself left residue, no residue was found when he burned the beanbag alongside the couch, due to the heat produced by the burning couch. The lack of polystyrene residue by the couch was therefore consistent with Lynam's investigation.[21]

Additionally, the evidence was that there were originally three beanbags on the foosball table. That there was alleged residue from them in the vicinity of the table does not in any way eliminate the possibility that Arndt moved one of them to the couch before setting it on fire.

Finally, the whole (alleged) point of the testimony was to show that Lyman did an inadequate investigation. As noted above, Mann testified to that thesis at length. It is difficult to see how the unremarkable presence of polystyrene where witnesses said the beanbags were would have suddenly persuaded the jury to accept his conclusions over those of Lynam, Rice and Iskra. This claim should be rejected.

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[20] This of course assumes that the polystyrene were from the beanbags; there was no testing to establish that it could not have come from the table itself.

[21] Notably, the crime lab did find styrene in residue recovered from near the couch, which is a component of polystyrene.

g. The trial court properly limited Mann's opinions regarding flashover

Mann testified at length about what flashover was, and what signs of it were present in the basement, and what their significance was. 20RP 3818-30, 3846. However, after Mann testified that "in this case I think looking at the entire room because it went to flashover, because you may find evidence of multiple origins and you have to be able to interpret what that means," the State objected. 20RP 3891. The court, consistent with its other rulings, allowed Mann to testify that he saw evidence of flashover, but because he did not conduct an origin and cause analysis, did not permit him to testify that flashover definitely occurred:

> THE COURT: Okay. So what I'm going to allow here is, again, similar to what I said throughout the testimony for Mann, he can testify to the indicators that he saw.
>
> Instead of saying "it went to flashover," as if he is making an opinion about that, he can indicate that based upon my review of the photographs, there are indicators of flashover, or this looks like it would be an indicator of flashover.
>
> But to come to the conclusion that it flashed over goes beyond the scope.

20RP 3893. Even after the court's ruling, Mann testified essentially that flashover occurred:

> Q. So from your review of the Kitsap County Fire Marshal's investigations, were there any indicators, as to whether or not flashover occurs when you look at a fire scene, missing?

> A. I believe that that fire scene had practically every post-fire indicator for flashover. And it had many indicators in the sequence, if you look at the timeline of flashover.
>
> So, yes, it had many – there's nothing at all inconsistent with anything about that fire to indicate that it did not go to flashover.

20RP 3894. He testified that the holes in the upper level floor were what he would expect to occur from flashover, and further opined that it did not indicate "that the origin is on the east side at all because of the flashover effects." 20RP 3943-44. He also criticized Rice for not considering flashover. 20RP 4036. As discussed with regard to the other claims, the trial court properly restricted Mann from offering opinions that amounted to a selective origin and cause conclusion.

Further, even if the court erred, the error would be harmless beyond a reasonable doubt. First, Mann essentially testified that flashover did occur, and that it undermined Lynam's conclusions. Additionally, as the other experts pointed out, flashover usually occurs when there is a buildup of heat throughout the room to the extent that all the surfaces in the room begin to vaporize and the vapors catch fire. Here, however, the large openings in the form of the open stairwell and ceiling vents would have prevented that heat buildup. Further, they also testified that the relative lack of charring on the shelves and the intact Christmas decorations all pointed to a lack of flashover occurring. Finally, none of

the other experts felt they would have found a different origin and cause even if flashover had occurred. This claim should be rejected.

h. The trial court did not limit Mann's testimony regarding light in the living room.

Arndt next faults the court for excluding Mann's "analysis"[22] of the light coming into the living room. As even Arndt notes, Brief of Appellant at 36 n.60, the court declined to strike the testimony. That testimony, which was presented without objection, included the following:

> The front window for the living room is located right here. There are actually two streetlights. There's a streetlight over here, which is 140 feet measured by Google from the front window. And in between there's a large conifer that's at the height of the light so that would cast a shadow towards the house.
>
> This light that we saw in the photo before this is 190 feet away. And how much light that's going to emit to the front of this house is, I suppose, a question. One could certainly measure that. There are instruments out there to easily and quickly verify foot candles or lumens at that point.
>
> It's also interesting that when I first got to the scene I actually took a 360 degree panoramic series of photographs – …
>
> And those were the only lights that I saw anywhere in the neighborhood when I did my 360 degree series of photographs from the sidewalk.

20RP 3898-99. Neither the record nor Arndt indicate what additional testimony should have been had on this subject. It is not apparent that the court abused its discretion.

Furthermore, any error would be harmless beyond a reasonable doubt. Kelly testified that the living room curtains were always open and that the neighbor had a bright halogen light that shone into the living room.[23] 17RP 3353-54. Finally, even defense counsel asked Mann, "you don't really consider the fact whether there was light or not, necessarily that important, based upon what previously you said how much smoke would be there." 20RP 3898. This claim should be rejected.

i. Iskra and Rice's proper opinion testimony did not open the door to Mann's improper evidence.

As noted, Mann emphatically insisted he was not doing an origin and cause investigation. Unlike Mann, Iskra testified that Iskra he went to the house to try to determine the origin and cause on behalf of Allstate Insurance. 9RP 1552. He specifically rejected Arndt's suggestion that he had done a technical review. 10RP 1816. The entire basis for excluding Mann's testimony regarding testing was that he had *not* done an origin and cause investigation. Because Iskra did perform an origin and cause investigation, his testimony cannot have opened the door to Mann's.

Arndt argues that like Mann, Iskra only did a partial review. This is inaccurate. The problem was that Mann had done a *selective* investigation,

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[22] He used Google maps for his "calculations." 20RP 3898.

[23] None of the witnesses indicated they had problems seeing in the living room or hall. 16RP 3175.

which was contrary to the scientific method. Iskra, on the other hand, did a complete investigation. 9RP 1612, 1637. His role was to determine for his insurance company client if there was a potential subrogee. 9RP 1634. After he determined the point of origin, he concluded the cause to be undetermined[24] because Lynam had removed the electrical outlets. 9RP 1634. Later, after reviewing the fire marshal's documentation and evidence, he concluded that the fire was incendiary, that it was intentionally set. 9RP 1635. He also concluded that the likely ignition source was an open flame from a lighter or matches. 9RP 1635.

Rice, on the other hand, performed a technical review, which is specifically authorized under NFPA 921. 10RP 1894. He explained that a technical reviewer reviews all the data, written reports, photos, and evidence collected, and that it is possible on occasion to reach an independent determination of origin and cause in a technical review. *Id.* There is no evidence in the record whatsoever that a technical review includes additional testing or experimentation.

Assuming that Mann's review could be considered a technical review, nothing Rice did opened any doors. Rice did his review and made recommendations for additional investigation to Lynam. 10RP 1928. One of those recommendations was the ember and couch and beanbag tests that

[24] "Undetermined" is one of the three classification for the cause of fires. 8RP 1541.

were performed at the Poulsbo fire training center. Rice helped Lynam conduct these tests. This additional investigation, however, was not part of his technical review; it occurred afterwards and was conducted by the Lynam as a supplement to his original origin and cause investigation. 13RP 2448, 2470. Moreover, Rice testified that he believed he was also retained to do an origin and cause. 13RP 2429.

These experts offered testimony and opinions that adhered to the relevant standards of their profession. To the extent his did not, Mann's were limited. Since the State's experts met the foundational requirements of ER 702, nothing in their testimony opened any doors for Mann's improper opinions.

Finally, Arndt fails to cite relevant authority for her contention. In the context of an expert witness, if one party opens the door, the court may admit "evidence on the same issue to rebut any *false* impression that might have resulted." *Marin v. King County*, 194 Wn. App. 795, 817, 378 P.3d 203, *review denied*, 186 Wn.2d 1028 (2016) (emphasis the Court's). Arndt fails to identify any false impression that Iskra or Rice left the jury with. As such if this claim had factual basis, she still fails to show a legal entitlement to admission of Mann's excluded testimony.

j. Arndt did not complain below that Mann could have testified as a fact witness.

In conjunction with her claims regarding the buckets, Arndt asserts that Mann should have been allowed to testify as a fact witness. Brief of Appellant at 28, 30. She fails to show were this claim was presented to the trial court. As a general rule evidentiary claims may not be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Mohamed*, 187 Wn. App. 630, 648, 350 P.3d 671 (2015). Even were this claim preserved, however, Arndt fails to show error. Mann was in no way limited in his factual observations. The trial court excluded only expert opinions that failed to comply with the scientific standards of his profession.

3. The trial court properly excluded Hanson's unqualified hearsay testimony.

Arndt asserts that the trial court erred in excluding evidence from Craig Hanson, a former fire marshal who had sued the county over his termination. Arndt argues that Hanson could testify that Lynam told employees not to videotape and to limit the number of photos taken to limit the ability to cross-examine. She also claims he could have testified regarding problems with evidence handling.

Arndt asserts that the statements were not hearsay because they were not offered for their truth. Instead she argues that they were offered to undermine Lynam's credibility. However, any relevance is not in the

instruction, but in the alleged reason for it. Unless the reason were true it would be irrelevant. As such, to be relevant, it had to be hearsay. The trial court properly excluded the statements. Further, the trial court also ruled the statements, and the contentions regarding evidence handling were not relevant because Hanson did not work in the office at the time of the investigation in this case. 2RP 347-48. Arndt does not address this foundational issue in her brief. The trial court also found that Arndt failed to show that Hanson was qualified to offer opinions on the subject of evidence handling. *Id.* Arndt also fails to address this ruling.

Finally, as noted, Hanson had previously sued Lynam, which would obviously called into question his bias. Iskra testified that in his opinion photographs are better than video for documenting the scene. 8RP 1491. Moreover, Mann repeatedly criticized Lynam on the same grounds as Hanson. If the jury did not accept his expert opinion on the matter, there is little likelihood they would have accepted the word of a man with a grudge. Any error would be harmless.

B. REFERENCES TO ARNDT'S FELONY MURDER CONVICTION SHOULD BE STRICKEN, BUT SHE OTHERWISE FAILS TO SHOW A DOUBLE JEOPARDY VIOLATION.

Arndt argues that she was subjected to double jeopardy based on (1) her convictions for aggravated first degree murder and felony murder

grounded in the same conduct, and (2) her conviction for first degree murder with an arson aggravator and her separate substantive arson conviction. The State agrees that although the sentencing court merged her felony murder and aggravated murder convictions, *see* CP 1319-20, the court's failure to vacate the felony murder conviction, as well as to strike the references to felony murder on her judgment and sentence, *see* CP 1318, subjected her to double jeopardy. The State disagrees, however, that the aggravated first degree murder and separate substantive convictions for arson subjected her to double jeopardy.

1. The felony murder conviction should be stricken from the judgment and sentence.

Arndt was convicted of first degree murder of Junior and also of felony murder of Junior. The sentencing court properly merged the felony murder and aggravated murder convictions at sentencing and only sentenced Arndt based on the aggravated murder count. However, the sentencing court left a reference to felony murder (Count II), labeling it as an alternative means, in the judgment and sentence. Under the authority of *In re Strandy*, 171 Wn.2d 817, 818-19, 256 P.3d 1159 (2011), the State concedes that Arndt's felony murder conviction should be vacated and reference to it should be stricken from the judgment and sentence.

2. *The Legislature intended to punish aggravated murder separately from the underlying aggravating offense.*

Arndt also argues that her aggravated first degree murder conviction, based on the arson aggravator,[25] and her separate substantive arson conviction subjected her to double jeopardy. An appellate court's review of a double jeopardy claim is limited to determining whether the trial court exceeded "its legislative authority by imposing multiple punishments for the same offense." *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (*citing Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)). Under the *Blockburger* test[26] there is a double jeopardy violation if the defendant is convicted of offenses that are identical both in fact and law. *Calle*, 125 Wn.2d at 777. But "'[i]f there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.'" *Id.* (*quoting State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)).

An arson aggravator, however, is not an element of the underlying crime. *State v. Brett*, 126 Wn.2d 136, 170, 892 P.2d 29 (1995) ("kidnapping aggravators are not 'charged offenses' for purposes of

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[25] RCW 10.95.020(11)(c).

[26] *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

double jeopardy"). Even though the aggravated first degree murder charge required proof that the killing was committed in the course of, or in furtherance of, first degree arson, an aggravator based on the murder being committed "in the course of" another crime, does not actually require proof that the other crime "was completed or attempted." *Brett*, 126 Wn.2d at 163. "[A] premeditated murder committed in the course of or in furtherance of a robbery, even when the robbery is not completed, is sufficient to find the existence of an aggravating circumstance." *Brett*, 126 Wn.2d at 162. The State need not prove a completed crime to establish the arson aggravator, so the aggravator is not a charged offense for double jeopardy purposes. In other words, because first degree arson requires proof of an actual arson, but only an arson, and aggravated first degree murder with arson as the aggravator requires proof of an actual murder but not a completed arson, each offense includes an element that the other does not. *See also State v. Benn*, 161 Wn.2d 256, 264, 165 P.3d (2007) (confirming the continued validity of *Brett*); *see also State v. Hylton*, 154 Wn. App. 945, 954–55, 226 P.3d 246, 251 (2010) (concluding that *Benn* was still good law).

The same evidence/elements test creates a presumption that the two offenses are not the same. This presumption may be overcome only by clear evidence of contrary legislative intent. *Calle*, 125 Wn.2d at 780.

Contrary legislative intent is shown by the statutes' historical development, legislative history, location in the criminal code, or the varying purposes for which they were enacted. *In re Percer*, 150 Wn.2d 41, 51, 75 P.3d 488 (2003). Murder is found in RCW 9A.32, the "Homicide" chapter, while arson is found in RCW 9A.48 along with reckless burning and malicious mischief, and the statutes address different evils: unlawful killing and unlawful property damage. Arndt does not cite any contrary legislative intent.

Here, the two crimes were based on the same events, Arndt's burning of the house followed by the murder, and she argues that the statutory elements of both aggravated first degree murder and first degree arson would always be met by the facts of this case. But the issue is not whether the same evidence is required to prove both crimes under the particular facts of the case, but whether proof of the same elements is necessarily required in all cases to establish the crimes. *See State v. Freeman*, 153 Wn.2d 765, 775-76, 108 P.3d 753 (2005) (discussing the difference between first degree assault forming part of the proof of first degree robbery and second degree assault forming part of the proof of first degree robbery).

3. Arndt fails to show arson merges into aggravated murder.

Arndt finally argues that her felony murder and arson convictions should have merged with the aggravated murder conviction for sentencing purposes. As noted above, the court did not impose sentence on the felony murder count, and thus as to the former contention, striking the offense from the judgment and sentence leaves no issue to be argued.

As to the latter claim, the merger doctrine applies when the degree of one offense is raised by conduct that the legislature has separately criminalized. *Freeman*, 153 Wn.2d at 772-73. Under those circumstances, the Court presumes that the Legislature intended to punish both offenses through a greater sentence for the greater crime and that the offenses merge. *Freeman*, 153 Wn.2d at 773. The merger doctrine does not apply to Arndt's offenses, as none of them are degree offenses that include the proof of another offense as an element.

C. THE STATE WILL NOT BE SEEKING APPELLATE COSTS.

The State will not be seeking appellate costs if it prevails, and as such will not address Arndt's claims in that regard.

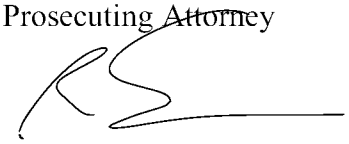
IV. CONCLUSION

For the foregoing reasons, Arndt's conviction and sentence should be affirmed, and the cause remanded to strike the references to Count II from the judgment and sentence.

DATED January 17, 2017.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney



RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

APPENDIX

☐ STATE
☐ PLAINTIFF
☐ PETITIONER
☐ OTHER _____

Exhibit No. 371
☑ DEFENDANT
☐ RESPONDENT

Case No. 14-1-00428-0

STATE OF WASHINGTON vs. SHELLY M. ARNDT

[√] Admitted
[ ] Withdrawn
[ ] Refused
[ ] Not Offered

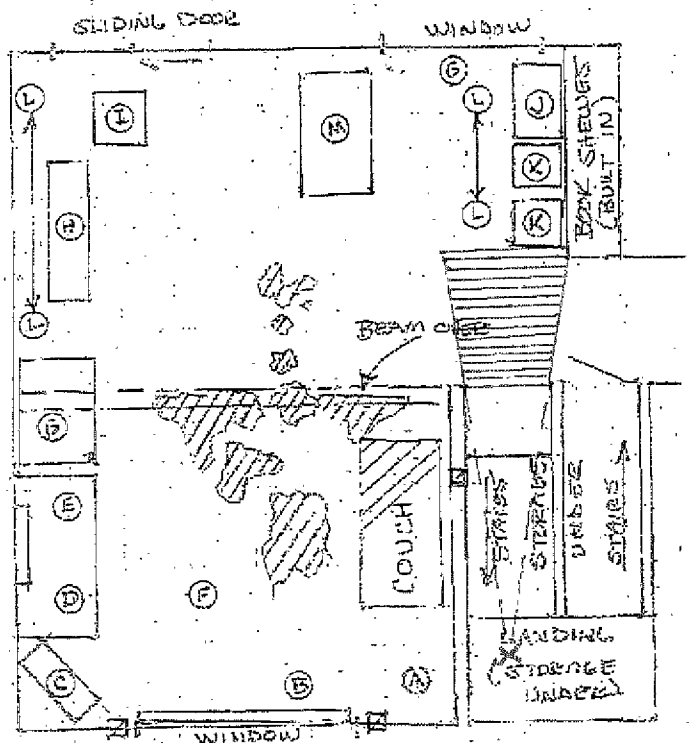
Date of Court's Ruling: NOV 16 2015

FIGURE II - DOWNSTAIRS

1/4" = 1'-0"

CASE # 14-797 2/23/14

6662 NE WELLINGTON LANE



☐ = PLUG INS
A = FLOOR FAN
B = BASE BOARD HEATER
C = T.V.
D = HEARTH
E = FIREPLACE INSERT
F = EMPTY COFFEE CAN
G = CABINET / SHELVES
H = WEIGHT BENCH
I = WEIGHT RACK
J = TRUNK
K = C.BOARD BOXES - XMAS
L = HOUSEHOLD STORAGE
M = FOOSBALL TABLE
/////// = STALLING
/////// = COMPLETELY BURNED OUT

KITSAP COUNTY PROSECUTOR

January 17, 2017 - 10:25 PM

Transmittal Letter

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Case Name: State v Shelly Arndt
Court of Appeals Case Number: 48525-7

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